
NO. 33435

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

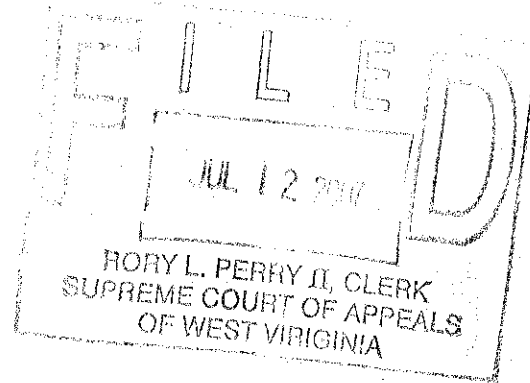
STATE OF WEST VIRGINIA,

Appellee,

v.

OWEN HAWK, III,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW

This is an appeal by Owen Hawk, III (hereinafter "Appellant") from the September 28, 2006, order of the Circuit Court of Roane County (Evans, J.), which sentenced him to a term of one (1) year to five (5) years in the state penitentiary upon his conviction by a jury of one count of fleeing from an officer in a vehicle while under the influence of alcohol in violation of West Virginia Code § 61-5-17(I). On appeal, Appellant claims that the circuit court committed error by violating *Brady v. Maryland*, 373 U.S. 84, 83 S. Ct. 1194 (1963), denying him due process and a fair trial.

II.

STATEMENT OF FACTS

This case arises out of an automobile accident on December 9, 2005, in Spencer where Appellant crashed his car into a police vehicle as well as various parked cars at a local dealership.

On that evening, Roane County Sheriff Todd Cole and Deputy Michael Knapp were waiting for a magistrate in the back of the county courthouse at approximately 9:00 p.m. to arraign Mr. Harry Reger, who they had recently arrested. (Tr. vol. I, 117, July 25, 2006.) While they were waiting for the magistrate, Sheriff Cole and Deputy Knapp noticed Appellant driving down Market Street without headlights. (*Id.* at 118, 207.) Appellant then turned onto Church Street and proceeded to drive down that one-way street traveling the wrong direction. (*Id.* at 118-19, 207.) Harry Reger testified that he also saw Appellant drive down the wrong direction of a one-way street without using headlights. (*Id.* at 190.) As Appellant was traveling down this street in the wrong direction, he almost struck a car head-on, the latter avoiding an accident by swerving off the road. (*Id.* at 119.)

When this occurred, Sheriff Cole put on his blue lights in his patrol car and followed Appellant on Route 33. (*Id.* at 120-21.) Appellant ignored the police car and accelerated his vehicle to approximately 55 to 60 miles per hour on a road that had a speed limit of 25 to 30 miles per hour. Mr. Reger testified that while he was in the police car during the chase, Sheriff Cole was driving substantially faster than 60 miles per hour, and Appellant did not let them get more than a car length in front of them. (*Id.* at 191.) In light of this, Sheriff Cole radioed the dispatcher for back-up. (*Id.* at 121-22.) During this pursuit, Appellant veered to his right off the road and onto the berm in order to pass a car in front of him. Lieutenant Simmons of the Spencer City Police Department was dispatched and parked his patrol car sideways on Route 33 in order to force Appellant to stop. (*Id.* at 192.) However, instead of stopping in front of Lieutenant Simmons' vehicle, Appellant crashed into it. (*Id.*) This collision caused an injury to the police officer's left forehead. (*Id.* at 174.) After this impact, Appellant then struck some vehicles in a car lot of a dealership. (*Id.* at 210.) Two witnesses employed at a Subway restaurant near the accident testified that Appellant traveled down

the road without headlights, crashed into Lieutenant Simmons and ricocheted into parked vehicles in the car dealership. (Tr. vol. II, 243, 253, July 26, 2006.) According to Sheriff Cole, Appellant never stopped for him during this pursuit until the collision with Lieutenant Simmons. (Tr. I, 124, July 25, 2006.)

Sheriff Cole then ran to Appellant's vehicle and repeatedly ordered him to put his hands up and get out of the car. Appellant was unresponsive to these requests. (*Id.* at 127.) Eventually, Appellant rolled down the window, and the sheriff again ordered him out of the car. Yet again, there was no response. (*Id.*) Both Subway employees who witnessed the event testified that Appellant was ordered out of his car but failed to comply. (Tr. vol. II, 245, 254, July 26, 2006.) At this point, Deputy Knapp came over to assist Sheriff Cole. They both reached into Appellant's car and pulled him out of it, all three went to the ground and the law enforcement officers handcuffed Appellant. (Tr. I, 213-14, July 25, 2006.)

Deputy Knapp then gave a preliminary breath test (PBT) to Appellant to determine if he was driving under the influence of alcohol, to which the latter failed. (*Id.* at 216.) The deputy testified that he smelled alcohol on Appellant's breath. (*Id.* at 216-17.) Sheriff Cole seized a half empty bottle of rum he found on the driver's side floorboard of Appellant's vehicle. (*Id.* at 135.) The sheriff also noticed that Appellant had an odor of alcohol on his breath and his eyes appeared to be red and glassy. (*Id.* at 139.) From this observation as well as the failed breath test, Sheriff Cole arrested Appellant for driving under the influence. (*Id.* at 140.) Further, Sheriff Cole noted that Appellant was not walking as a normal person and was stumbling. (*Id.* at 142.)

At this time, Patrolman Trevor Mertz of the Spencer City Police Department arrived, and Appellant and Harry Reger were placed in his cruiser. (*Id.* at 183-84.) While in the car together,

Appellant and Mr. Reger had a conversation. Mr. Reger stated that Appellant told him that he was not that intoxicated, but the latter had an odor of alcohol on his breath and his eyes looked as if he had been drinking. (*Id.* at 197, 199.)

Appellant was taken into the custody of Deputies King and Unger of the Roane County Sheriff's Department where he would be transported for a secondary chemical test at the State Police office. While walking to Deputy King's vehicle, Appellant fell over, breaking the antennae on Deputy Knapp's car and shattering the back windshield. (*Id.* at 219-20.) After this, Deputy Knapp took Appellant to an emergency medical services (EMS) station in Spencer to be examined for injuries the latter incurred when he originally was taken down to the ground upon resisting arrest. (*Id.* at 218.)

At approximately 10:40 p.m., Appellant was transported to the State Police barracks. While there, Appellant was read and given an implied consent form, which states that by operating a vehicle in West Virginia, you are consenting to be subject to a secondary chemical test of one's blood, breath or urine. Appellant signed this form. (*Id.* at 145-56.) However, when asked to take the secondary chemical test on two separate occasions, Appellant refused to do so. (*Id.* at 149-51.) Sheriff Cole testified that based on all of his observations throughout that evening, Appellant was definitely under the influence of alcohol. (*Id.* at 152.)

On July 26, 2006, the jury found Appellant guilty of one count of fleeing from an officer in a vehicle while under the influence of alcohol. (Tr. vol. II, 410-02, July 26, 2006; R.at 135.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

- A. THE COURT ERRED AND VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL BY NOT GRANTING THE DEFENDANT A CONTINUANCE UPON NOTICE OF THE *BRADY* DISCLOSURE.

State's Response:

The trial court's decision to deny Appellant's motion for a continuance was not a violation to his right to due process and a fair trial. The alleged failure of the State to turn over all material prior to trial in a timely manner was not a violation of *Brady, supra*.

- B. THE COURT ERRED AND VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL BY NOT REQUIRING THE STATE TO TURN OVER ALL *BRADY* MATERIAL PRIOR TO TRIAL IN A TIMELY MANNER WHICH WOULD ALLOW THE DEFENSE TO FULLY INVESTIGATE THE CASE.

State's Response:

The trial court did not err because the alleged failure of the State to disclose all material prior to trial in a timely manner was not a violation of *Brady, supra*.

IV.

ARGUMENT

THE STATE'S ALLEGED UNTIMELY DISCLOSURE AND TURNING OVER OF MATERIAL TO APPELLANT DID NOT AMOUNT TO A VIOLATION OF *BRADY, SUPRA*. THEREFORE, APPELLANT IS NOT ENTITLED TO A NEW TRIAL.

Appellant alleges that the State turned over material prior to the trial in an untimely manner which would have enabled his counsel to provide a defense for him; thus, in violation of *Brady*,

supra. However, the presentation of this evidence in question by Appellant would in no way have altered the outcome of this case. Therefore, there was no *Brady* violation, and Appellant's constitutional rights to due process and a fair trial were not violated.

1. The Standard of Review.

Regarding the suppression of evidence by the State, the United States Supreme Court held in *Brady, supra*, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 86, 83 S. Ct. at 1197. The United States Supreme Court later held in *Youngblood v. West Virginia*, ___ U.S. ___, 126 S. Ct. 2188, 2190 (2006), the following:

A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. *See* 373 U.S., at 87, 83 S.Ct. 1194. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," *Kyles*, 514 U.S., at 438, 115 S.Ct. 1555. *See id.*, at 437, 115 S.Ct. 1555 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Bagley, supra*, at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.)), although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435, 115 S.Ct. 1555.

2. **The Material That Was Allegedly Not Handed Over in a Timely Manner to Appellant Was Not *Brady* material and Would Not Have Put the Case in Such a Light as to Undermine the Confidence in the Verdict. Thus, Appellant's Constitutional Rights Were Not Violated by the Trial Court's Denial of a Continuance Motion and Its Alleged Failure to Require the State to Turn over All Material in a Timely Manner.**

Appellant contends that a police report by one of the officers involved in the case was slipped under his counsel's door the day before the trial after hours, and she was not aware of this disclosure until the day of the trial. (*See* Appellant's Brief at 10; Tr. vol. I, 6, July 25, 2006.) On this basis, Appellant moved for a continuance via fax before the proceedings. (Tr. vol. I, 5, July 25, 2006.) A bench conference occurred prior to the commencement of the trial on this matter. (*Id.* at 4-13.) The circumstances behind this alleged late disclosure were not fully brought out during the conference, but Appellant moved for this continuance on the basis that another arrestee, Mr. John Phillips, was in a vehicle with Deputies Unger and King before Appellant was transferred to the Central Regional Jail. (*Id.* at 11.) The reasoning behind Appellant's seeking this continuance in order to obtain evidence from Mr. Phillips was that he refused to take the second chemical test because the law enforcement officers committed acts of brutality against him, and this other arrestee could have testified in support of Appellant's contention that Deputy Knapp pushed him when he fell into the back of the police car. (*Id.* at 7-8.)

Appellant correctly asserts that granting of continuances is a matter of discretion on the part of the trial court. With respect to a trial court's rulings on continuances, this Court has held the following:

"It is well settled as a general rule that the question of continuance is in the sound discretion of the trial court, which will not be reviewed by the appellate court, except in case it clearly appears that such discretion has been abused." Syllabus Point 1, *Levy v. Scottish Union & Nat'l Ins. Co.*, 58 W.Va. 546, 52 S.E. 449 (1905).

"A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syllabus Point 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

Syl. Pts. 1 and 2, *Shroades v. Food Lion, Inc.*, 207 W. Va. 106, 530 S.E.2d 456 (1999). There was no abuse of discretion in the trial court's denial of Appellant's motion for a continuance due to the fact that the standard established in *Brady, supra*, was not violated.

At this conference before the trial started, it was determined that Mr. Phillips was not present during the events of the crime for which Appellant was charged, fleeing in a vehicle while under the influence of alcohol. (*Id.* at 6-7.) Additionally, Mr. Phillips was not present when Appellant refused to take the intoxilyzer test. (*Id.* at 8.) Further, at no time was Mr. Phillips placed in the same car as Appellant. (*Id.* at 10.) It was established that this person only observed Appellant when Deputies Unger and King were exchanging arrestees with Deputy Knapp before Appellant was transferred to the regional jail. (*Id.* at 11.) In light of this, the trial judge denied the motion for a continuance because he determined that Mr. Phillips was not a material witness and his testimony was not relevant to the case. (*Id.* at 11, 13.)

It is quite apparent that there was no *Brady* violation in this case. In light of Mr. Phillips not being present during the chase, accident and arrest of Appellant, there is no way that any testimony that he could have given would have been favorable to Appellant for purposes of determining guilt or punishment as established in *Brady*. Additionally, it appears highly dubious, at best, that Mr. Phillips' testimony could be reasonably taken to put the whole case in such a different light so as to undermine the confidence in the verdict as set forth in *Youngblood, supra*.

In *State v. Youngblood*, ___ W.Va. ___, ___ S.E. 2d ___, 2007 WL 1388186 (2007), this

Court applied *Brady, supra*, and held the following:

There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and *State v. Hatfield*, 169 W. Va. 191, 286 S.E. 2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, it must have prejudiced the defense at trial.

Id. at Syl. Pt. 2. Clearly, Appellant fails to meet the first component of this standard. Since Mr. Phillips did not even observe Appellant until after the offense occurred, there is no exculpatory testimony that he could have given. Additionally, Appellant and Mr. Phillips were not in a vehicle together—as Appellant and Mr. Reger were—so the latter could not have provided any exculpatory testimony in the form of observing sobriety or his lack of being under the influence of alcohol. Numerous witnesses, both law enforcement and bystanders, witnessed Appellant's driving without headlights, traveling the wrong direction down a one-way street speeding, fleeing a police vehicle, crashing into parked cars and resisting arrest. Additionally, there was overwhelming evidence presented at trial that Appellant was indeed under the influence of alcohol: Sheriff Cole finding a half empty bottle of rum in the driver's side floorboard, noticing he suffered from red, glassy eyes and smelled of alcohol and observing that he was walking as if impaired by alcohol; Deputy Knapp noting Appellant had an odor of alcohol on his breath and administering the preliminary breath test to which Appellant failed and Harry Reger noting Appellant having alcohol on his breath and looking as if he had been drinking. (Tr. vol. I, 135, 139, 142, 152, 216-17, 197 and 199, July 25, 2006.) In light of all of this evidence, a claim that exculpatory evidence could arise from the testimony of Mr. Phillips is very unlikely.

The impeachment of Deputy Knapp's credibility seems to be the basis of Appellant's claim of being denied his rights to due process and a fair trial in his being unable to present Mr. Phillips' testimony. However, it is doubtful that Mr. Phillips' testimony could be used to impeach the credibility of Deputy Knapp as well. Sheriff Cole, Deputy Knapp, Deputy Unger and Patrolman Mertz all testified that at no time did they or any other law enforcement officer hit, strike, kick, beat or otherwise abuse Appellant from the time of the arrest to his transportation to the regional jail. (Tr. vol. I, 156-57, 185, 220-21, July 25, 2006; Tr. vol. II, 271-72, July 26, 2006.) Regarding Appellant's allegation that Deputy Knapp abused him before he was being transported to the regional jail, the deputy testified that Appellant just fell into the antennae of the rear of his vehicle. (Tr. vol. I, 220, July 25, 2006.) Deputy Unger stated that Appellant stumbled and fell into Deputy Knapp's car. (Tr., vol. II, 271, July 26, 2006.) Conversely, both Sheriff Cole and Deputy Knapp as well as the two Subway employees testified that Appellant did not cooperate and resisted arrest. (Tr. vol. I, 127-29, 213-14, July 25, 2006; Tr. II, 245, 254, July 26, 2006.)

In light of this, any testimony by an arrestee in the back of a police vehicle that would impeach the credibility of Deputy Knapp seems highly speculative, at best. Accordingly, the trial judge made the correct decision in characterizing any testimony that Mr. Phillips may have given as irrelevant and denying Appellant's motion for a continuance. There was no abuse of discretion by the trial court in this denial because there was no *Brady* violation regarding this material. In no way could Mr. Phillips' testimony, if given, reasonably be taken to put the whole case in such a different light so as to undermine the confidence in the verdict. Appellant's constitutional right to due process and a fair trial were not violated by this denial.

As with the trial court's decision to deny Appellant's motion for a continuance, it did not violate his constitutional right to due process and a fair trial by not requiring the State to turn over all *Brady* material in a timely manner prior to trial. Again, this is because the testimony of this potential witness was not *Brady* material and it would not have put the case in such a different light so as to undermine the confidence in the verdict. Regarding prosecution's turning over material to the defense, this Court has held, "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syl. Pt. 4, *State v. Hatfield*, 169 W. Va. 191, 286 S.E. 2d 402 (1982). However as outlined above, this evidence was not exculpatory by creating doubt as to his guilt. Thus, Appellant's due process rights were not violated by the prosecutor's actions in this matter. In light of this, the trial court's decision should not be reversed.

V.

CONCLUSION


For the foregoing reasons, the judgment of the Circuit Court of Roane County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

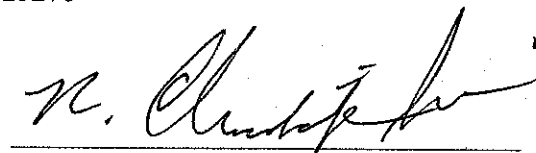
A handwritten signature in cursive script, likely belonging to R. Christopher Smith, is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 12th day of July, 2007, addressed as follows:

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